

CANADA / JUDGMENT

R. v. Knapp

2024 BCSC 2550

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Knapp,

2024 BCSC 2550

Date: 20241122

Docket: 40786

Registry: Port Alberni

Rex

v.

Michael Albert Knapp

Before: The Honourable Justice Thompson

Oral Ruling on Voir Dire

re: Section 8 Charter Application

Counsel for the Crown:

D. Diab

Counsel for the Accused:

T. Spettigue

Place and Dates of Hearing:

Port Alberni, B.C.

September 3-4, 2024

Place and Date of Judgment:

Port Alberni, B.C.

November 22, 2024

- [1] The accused is charged with possession for the purpose of trafficking in fentanyl and possession for the purpose of trafficking in methamphetamine. The substances were located during a cell-block search of a backpack that had been in the possession of the accused. The accused applies pursuant to ss. 8 and 24(2) of the Charter to exclude from evidence any items located during what he submits was an unreasonable search. These reasons address the issue of whether there was a s. 8 infringement.
- [2] The officer who arrested the accused and conducted the warrantless search relies on the common law power to conduct a search incidental to arrest. The ultimate s. 8 issue is whether the search in this case occurred within the limits of what the Supreme Court of Canada has described as an extraordinary power. For the reasons that follow, I find the Crown has not established that the backpack search was truly incidental to the arrest.

I

- [3] The facts are not complicated. In the course of his patrol duties on 1 February 2023, Constable Pinto walked into the Overdose Prevention Site premises in Port Alberni. As he did so, he saw the accused. Cst. Pinto knew the accused from past contact.
- [4] Cst. Pinto knew from briefing himself at the start of his shift that the accused was on a list of persons who were the subject of arrest warrants. Cst. Pinto executed the arrest warrant. He told the accused why he was under arrest, took hold of his arms, took the pack from his back and placed it on the floor, and put the accused in handcuffs.
- [5] Another man in the Overdose Prevention Site approached and picked up the backpack, claiming it as his. The accused confirmed that it belonged to this other man. Cst. Pinto retook possession of the pack, and said words to the effect of "No, that is his [i.e., the accused's]." Cst. Pinto testified that he believed the backpack to belong to the accused, and that it is his practice to bring along an arrestee's belongings to the detachment.
- [6] Cst. Pinto carried the backpack and escorted the accused to his nearby police vehicle, where he did a pat-down search of the accused's pockets and waistline. He testified that he conducted this as a search incident to arrest, and in particular was checking for "weapons or means of escape." In the pockets, Cst. Pinto found items that I expect might be carried by many persons at a safe consumption site: a very small Ziploc baggie of what the constable suspected was drugs, a folding knife, and \$256.50 cash. After this pat-down search - which is not challenged - Cst. Pinto put the accused in the rear of the police vehicle. Cst. Pinto testified that the accused was cooperative throughout his dealings with him.

- [7] Cst. Pinto placed the backpack and the items he had found in the accused's pockets on the front passenger seat of the police vehicle. Cst. Pinto then accessed information about the nature of the warrant; this further information was not disclosed in the evidence. Before departing for the detachment, Cst. Pinto advised the accused of his rights under s. 10 of the Charter, and also read him the "official warning."
- [8] Cst. Pinto was asked why he did not search the backpack at that time. He replied that he did not feel comfortable turning his back to anyone at the Overdose Prevention Site. He testified that the Site is a place where there are several people inside and outside using drugs, they may have had "sharps," and there is other criminal activity happening. Cst. Pinto was patrolling alone, and he testified that he did not feel it was safe to take the time to search the bag on scene.
- [9] Upon arrival at the detachment, Cst. Pinto "processed" the accused before lodging him in cells. This process, which Cst. Pinto testified is followed for all prisoners being lodged in cells, included searching the prisoner, taking an inventory of all of their belongings (which is recorded on a sheet that is signed by the prisoner), and placing those belongings in a secure locker.
- [10] In the course of this process, Cst. Pinto searched the backpack. When asked why he conducted the search, he said it was to take account of the items so it could be confirmed when the prisoner departs that they leave with all their belongings, and "to make sure it was safe" because multiple people were going to be handling and processing the backpack's contents. Cst. Pinto was asked what he believed at the time was his authority for searching the backpack. He said that it was a search incident to arrest.
- [11] I agree with the accused's submission that the police officer was following a practice of searching items such as backpacks as part of the booking process. I find that this was a search conducted as a matter of course related to this process, and not as a result of a reasoned assessment of whether these specific circumstances met the criteria for exercising the extraordinary power of search incident to arrest.

II

- [12] The Crown bears the burden of establishing that a warrantless search is authorized by law. The Crown's position is that the legality of the search can be justified on the evidence in this case on a stand-alone ground of a safety search, a species of search incident to arrest that is sanctioned by a line of controlling authorities, including *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, and *R. v. Caslake*, [1998] 1 S.C.R. 51.

- [13] The Crown explicitly does not seek to discharge this burden on the basis of the legality of an inventory search. On the facts of this case, this is sensible. Whether or not an "inventory search exception" to s. 8 exists in law may be an open question, but when asked what his authority was for searching the backpack at the detachment, Cst. Pinto answered that it was a search incident to arrest.
- [14] In *Caslake*, one of the important issues dividing the Court's majority from the minority was the issue of whether the police could rely on the fact that a legitimate purpose for a search might exist when that is not the purpose for which they searched. Writing for the majority, Chief Justice Lamer held that because agents of the state must act in accordance with the rule of law, the police must turn their mind to their authority for conducting a warrantless search and be satisfied that there is a valid purpose for the search incident to arrest before it is carried out. "Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched" (para. 27). So, if the search of the backpack - which I find took place as part of the booking process - was in fact an inventory search per se, i.e. not in any valid sense a search incident to arrest, the Crown could not attempt to justify the legality of the search on the basis of a different authority altogether. The Crown's position that the legality of the search in this case must be grounded in a valid search incident to arrest is an appropriate recognition of the law laid down in *Caslake* over 25 years ago.
- [15] In *Caslake*, the Crown and a multitude of intervening Attorneys-General argued that even if the search was not properly authorized by the doctrine of search incident to arrest, there ought to be an inventory search exception to s. 8 of the Charter. At para. 30, Chief Justice Lamer explained why he declined to decide the question, and in doing so made clear that a search conducted only for inventory purposes is outside the bounds of the common law power of search incident to arrest:

Suffice to say that an inventory search per se does not serve a "valid objective in pursuit of the ends of criminal justice" (Cloutier, *supra*, at p. 186) in the context of an arrest such that it can be justifiably carried out under this warrantless common-law power. Its purposes relate to concerns extraneous to the criminal law.

- [16] As I said at the outset, the issue in this case is whether the search was truly an incident of the arrest. In this connection, the Chief Justice in *Caslake* said that this extraordinary common-law power to search incident to arrest arises from the need for the police to gain control of things or information, and "[t]his means, simply put, that that the search is only justifiable if the purpose of the search is related to the purpose of the arrest" (para. 17). In this connection, the Chief Justice quoted the statement of Justice Doherty in *R. v. Belnavis* (1996), 107 C.C.C. (3d) 195 at 213 (Ont. C.A.), *aff'd* [1997] 3 S.C.R. 341: "The authority to search as an incident of the arrest does not extend to searches undertaken for purposes which have no connection to the reason for the arrest." See also *R. v. Fearon*, 2014 SCC 77 at para. 21.

[17] To the same effect, in *R. v. Bakal*, 2021 ONCA 584 at para. 60, the Ontario Court of Appeal took notice of the importance placed in *Caslake* on the reason for the arrest:

Rather, the common law requires the police to ask whether the search is "truly incidental to the arrest in question": *Caslake*, at para. 17. Officers must take into account all of the known information when deciding whether what they are looking for is truly incidental to the arrest. At the end of the day, what is required is that the police are able to clearly explain why they did what they did and how it was connected to the arrest. On that basis, an after-the-fact reviewer will be able to determine whether a "valid purpose connected to the arrest" was being pursued and, if so, whether it was "objectively reasonable" in the circumstances: *Caslake*, at paras. 19, 25.

III

[18] In the case at bar, the Crown cited *R. v. Ojukwu*, 2023 ONSC 1736. Justice Barrett's reasons emphasize the necessary connection between a search incident to arrest and the reason for the arrest. At para. 40, the judge made the point that the police must subjectively believe that the search is connected to the arrest, and at para. 43, he cited *Bakal* and *Fearon* in support of the requirement that the police clearly explain why they searched and how it was connected to the arrest.

[19] The cases cited by the accused in the case at bar include *R. v. Howell*, 2020 BCSC 1731, and *R. v. Smith*, 2019 SKCA 126. The reasoning in the *Howell* and *Smith* cases was not questioned in *Ojukwu*, but each was distinguished on its facts:

[48] Whether the police can look in a bag found in an arrestee's physical possession based on safety concerns, will depend on the particular circumstances of each case. That said, there can be little doubt that the power to search incident to arrest includes the power to take possession of any bag on or with an arrestee at the time of the arrest.

[49] In some circumstances, any safety threat may be eliminated once an accused no longer has access to the item. That was the finding in *R. v. Howell*, 2020 BCSC 1731, 387 C.R.R. (2d) 68. In that case, the accused was handcuffed and secure in the police vehicle without access to his knapsack at the time it was searched. The officer testified that the search was conducted as a matter of course. The court found that the search was unreasonable as there was no safety risk. Nor was there any basis upon which the officer could reasonably believe the search might uncover evidence related to the arrest on outstanding warrants for 26 counts of fraud. Consequently, the drugs found in the knapsack were excluded from evidence.

[50] Similarly, in *Smith*, the court found that any threat of safety was "reasonably and effectively averted" once *Smith* was arrested, handcuffed, and separated from her purse: at para. 37. Given that there was "no suggestion" the police believed *Ms. Smith* had a weapon in her purse, it could not be searched incident to her arrest: *Smith*, at para. 35. On appeal, the court upheld the trial judge's decision to exclude the 2.7 ounces of methamphetamine found in a camera case in her purse.

[51] While the defence analogizes the instant case to that of Smith and Howell, those cases share two common factors not found in Mr. Ojukwu's case. Specifically, both Smith and Howell involved arrests for outstanding warrants related to non-violent offences. In Smith, the outstanding warrant was for possession of stolen property and obstruction. In Howell, the outstanding warrants were for 26 counts of fraud. The non-violent nature of the index offence combined with the lack of any temporal proximity between the alleged crime and the arrest render these cases wholly distinguishable from Mr. Ojukwu's case.

[Emphasis in original.]

[20] The fundamental problem for the Crown in the case at bar is that unlike the Ojukwu case, there is no evidence about the underlying basis of the arrest warrant. Cst. Pinto did not provide the required explanation of the connection between the reason for the arrest and what he seeks to justify as a search incident to arrest.

[21] This requirement that the police articulate a justification for the use of their authority to execute an arrest or a search without warrant is well established in the caselaw, including Caslake, at para. 25. I was referred to R. v. Crocker, 2009 BCCA 388 at para. 62, leave to appeal refused [2010] 1 S.C.R. viii, wherein D. Smith J.A. addressed the requirement that police officers articulate grounds for a particular use of authority in order to equip a judge to make the necessary assessment:

In assessing an officer's expressed subjective belief it is important not to conflate the subjective and objective grounds for establishing the standard of reasonable suspicions. An officer's subjective belief in the level of risk for a protective safety search is established if he or she can articulate a basis for his or her suspicions. It is only when the objective standard is applied to the officer's articulated subjective belief for being suspicious that the reasonableness of his or her suspicions is determined.

[22] To the same effect, in his majority reasons in Mitchell v. R., 2005 NBCA 104 at para. 13, Robertson J.A. said:

What is required is that the police have a reasonable basis for conducting the search, which is to be evaluated on both a subjective and objective level. The subjective element asks whether the police officer conducting the search was actually doing so for purposes related to the arrest. The objective component ensures that the police officer's belief that a valid purpose would be served by conducting the search was reasonable in the circumstances.

[23] The obligation to articulate a justification for the use of an extraordinary power to search is not fulfilled by the explanation of safety concerns in relation to the process of taking an inventory of the accused's belongings, without any explanation of how this relates to the accused's arrest. The Caslake majority explicitly held that if the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. I find that the backpack search in this case was not incident to arrest; it was incident to the constable's practice of taking an inventory of his

prisoners' belongings regardless of the reason for the arrest.

- [24] In the context of an inventory search of a vehicle, Justice Binnie, writing for the Court in *R. v. Nolet*, 2010 SCC 24 at para. 53, referred to *Caslake* and described the inventory search in *Nolet* as "incidental to RCMP administrative procedures rather than to the arrest of the appellants." Likewise, the search in the case at bar was part of the RCMP's booking process or this constable's booking practice, and the search was incidental to that process or practice and not in any recognized sense an incident of the accused's arrest.
- [25] On this point, the Saskatchewan Court of Appeal said this in *Smith*:
- [42] However, it is important to remember that the common law police power to search incident to an arrest only permits the police to conduct searches that are truly incidental to the arrest in question (*R v Caslake* at para 19). Here, Ms. Smith had not been arrested on weapons-related offences and, once she had been isolated from her purse, any concern for safety could no longer be premised on whether there might be a potential weapon in her purse that she might use against the police or the public, or to aid in an escape. At that point, on the Crown's argument, the safety concern became whether there might be something in the purse that could--independent of any action on Ms. Smith's part and independent of her arrest--injure an officer or a detention staff member while they were going through her purse for inventory purposes at the police station.
- [43] Looking at the Crown's argument in that way, the principle it puts forward would permit the police to search a purse, backpack or other bag every time they arrest someone because there is always a possibility that something inside items like those could harm other officers or detention staff. That is, the Crown's proposition is that such a search is necessarily incidental to all arrests where the detainee has a purse, backpack or other container that might conceal a weapon or an object that could cause harm to an officer or detention staff conducting an inventory search. This would be the case even though *R v Caslake* and *R v Nolet* stand for the proposition that an inventory search is not a valid objective for a search incident to arrest. In *R v Nolet*, the Court wrote:
- [53] The following day an RCMP officer from the Integrated Proceeds of Crime Unit searched the tractor-trailer rig for the purpose of creating an inventory. *Caslake* ruled that "an inventory search per se does not serve a 'valid objective in pursuit of the ends of criminal justice'" because its purposes "relate to concerns extraneous to the criminal law. If the police feel the need to inventory a car in their possession for their own purposes, that is one thing. However, if they wish to tender the fruits of that inventory search into evidence at a criminal trial, the search must be conducted under some lawful authority" (para. 30). Corporal Houston's work was incidental to RCMP administrative procedures rather than to the arrest of the appellants. As a result, it did not meet the requirements of a warrantless search, and the fruits of the "inventory" search were thus harvested in breach of s. 8.

In short, *R v Nolet* states that the Crown may tender at trial evidence discovered as part of an inventory search provided the search was itself conducted pursuant to some lawful authority. *R v Nolet* cannot be reverse engineered to support an assertion that the fact the police will later conduct an inventory search somehow justifies a search incident to arrest. The common law power of search incident to arrest has not been expanded to allow a blanket search of the personal property of a detainee on the basis it will inevitably be searched for inventory purposes.

[Emphasis in original.]

[26] The search in our case was not truly an incident of the accused's arrest. It was, in fact, a search conducted as part of a police booking process.

IV

[27] This brings me to another case relied upon by the Crown, *R. v. Majedi*, 2009 BCCA 276. The police detained Ms. Majedi, believing that she was in Vancouver in violation of a provision of a recognizance. After making further inquiries via dispatch, the police arrested Ms. Majedi, handcuffed her, and placed her in a police car. Since her vehicle was parked illegally, the police impounded it. They searched the vehicle and located two handbags. The handbags were searched and seized, and drug paraphernalia and cash were seized. Ms. Majedi was re-arrested for drug trafficking.

[28] The trial judge found that the searches of the handbags were valid searches incident to arrest, and convicted Ms. Majedi. He held that inventory was part of the reason for the searches, but not the only reason. The officers who searched the bags testified that they did so for multiple reasons: (1) "court papers" (i.e. evidence related to the breach of recognizance) might be inside; (2) the vehicle was being impounded, they were responsible for it and, therefore, an inventory of its contents was necessary; and (3) the bags would accompany Ms. Majedi when she was jailed so a search for sharp objects would protect custodial staff who would be handling their contents.

[29] The Court of Appeal dismissed the appeal, and in its reasons for doing so expressed itself on issues of search incident to arrest in a way that the Saskatchewan Court of Appeal in *Smith*, at para. 40, criticized as being at odds with core aspects of *Caslake*. Of course, I must follow *Caslake*. I think *Majedi* must be read in the context of the appellant's position on appeal, summarized at paras. 11-13:

[11] Ms. Majedi contends the searches were inventory searches only and the judge erred in ruling they were for a valid criminal justice purpose and not unreasonable contrary to s. 8 of the Charter.

[12] She also contends the judge erred in his alternative conclusion that, even if the searches were not valid, the evidence should be admitted under s. 24(2) of the Charter.

[13] Ms. Majedi states the judge misstated the Court's conclusion in Caslake and incorrectly placed the burden of proof on her to establish there was a breach of the Charter.

[Emphasis added.]

[30] Fundamentally, the Majedi appeal was about whether the trial judge erred in finding that the searches were not solely for inventory purposes or whether he misunderstood Caslake or reversed the burden of proof. The Court of Appeal concluded that the trial judge made none of the alleged errors, and the ratio decidendi of Majedi emerges from the Court's rejection of the appellants' contentions. In this connection, it is notable that at para. 26, Chiasson J.A., writing for the division, said:

Officer Oliver said he was looking for exculpatory papers. Ostensibly, that purpose was valid and connected to the arrest. Ms. Majedi stated the papers were not there. The judge took note of the officer's stated purpose, in para. 42, as an additional factor relevant to the validity of the search. He was entitled to accept the officer's evidence on the point.

[31] The trial judge in Majedi acted upon police articulation of the purposes for the search that were ostensibly valid and connected to the reason for the arrest, and found that the search was not an inventory search per se. This distinguishes Majedi from the case at bar because I find that I do not have a record of articulation of the purpose for the search that is either ostensibly valid or connected to the reasons for the accused's arrest; moreover, I find that the search of the accused's backpack was, in fact, an inventory search and only an inventory search - that is, an inventory search per se.

[32] Before I leave Majedi, I acknowledge that para. 26, which I have just quoted, is difficult to reconcile with an earlier part of the reasons:

[20] A starting point in the analysis in this case is the fact the search of the purses had nothing to do with the crime for which Ms. Majedi was arrested: breach of a recognizance. The facts needed to charge her for that crime were known: she was identified as a person in a place she was not supposed to be.

[21] It becomes necessary to consider other aspects that can support a search incidental to an arrest. As noted, the inquiry concerns the subjective belief of the officers, the reasonableness of which must be considered objectively. The task is not to provide a counsel of perfection.

[33] I do not think it is open to me to conclude that this passage expressly or by implication holds that a connection to the reason for the arrest is not a necessary element of a valid search incident to arrest. Higher authority than Majedi explicitly speaks to this requirement, including key passages in Caslake and Fearon. And, given what Chiasson J.A. said a few paragraphs later at para. 26, I think, with respect, it is likely that despite what was written at paras. 20 and 21, the Majedi court understood the importance of an articulated search purpose that is connected to the reason for the arrest.

- [34] The reasons in Majedi also contain dicta on the issue of an inventory search by jail staff. In Majedi, the police testified that one of the reasons they searched the handbags was their belief that the handbags would accompany her to the jail and would be searched there by jail staff. In obiter at para. 33, Chiasson J.A. opined on the legality of a jail-staff inventory search. As the issue has been framed by the parties in the case at bar, there is no reason for me to say more than acknowledge the presence of this dicta in Majedi - as noted earlier, the Crown does not seek in the case at bar to justify the backpack search on the basis of a valid inventory search that is separate and apart from what it contends was a valid search incident to arrest.
- [35] The Crown also cited R. v. Tsang, 2014 BCSC 1054. In that case, the judge found that the officer turned his mind to the basis for the search he conducted of the vehicle the accused was found in, and that it was a purpose within the permissible scope of a search incident to arrest (para. 77). As will be clear from what I have said to this point, this is not our case. I find that Cst. Pinto did not turn his mind to a basis for the search he conducted of the backpack that was within the scope of a search incident to the arrest.

V

- [36] Cst. Pinto's state of mind about the need for a protective safety search was wholly connected to the inventory search that he carried out, and which he always carried out at the Port Alberni detachment when booking a prisoner into cells. I conclude that the Crown's case in support of the purported search incident to arrest falls at the subjective hurdle: the constable conducted a matter-of-course search and did not form a subjective suspicion within the limits of the search incident to arrest doctrine. In particular, there is no articulated basis for the search that connects it to the reason for the arrest.
- [37] Accordingly, there is nothing to test by an objective standard. In the result, the Crown's effort to carry its burden of establishing the legality of the search fails. The presumption that this warrantless search was unreasonable has not been displaced. It follows that the accused has established an infringement of his s. 8 Charter right to be secure against unreasonable search.

"Thompson J."

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